No. 735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

THE BALTIMORE TRANSIT COMPANY AND
THE BALTIMORE COACH COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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The brief for the National Labor Relations Board in opposition to the petition presents eight questions, and the argument (p. 15) discusses those questions in the order in which they are stated. The following reply is respectfully submitted:

1. The Board's statement that the finding by the court below that the National Labor Relations Act applies to petitioners "raises no conflict with decisions of other circuit courts of appeals" is somewhat disingenuous. The precise question has not been raised in any other jurisdiction. This is the first case in which the Board has attempted to extend its jurisdiction over an employer engaged solely in local public passenger transportation for hire. Until its decision in this case, the Board itself ruled with respect to these petitioners that the Act did not apply, and made the same ruling with respect to similar services, such as those furnished by taxicab companies (Petitioners' Brief, pp. 16, 17). The ruling on jurisdiction in this case, therefore, is in conflict with every prior decision made on the subject by the National Labor Relations Board, the only tribunal authorized by Congress to determine the question in the first instance.

The Board's contention that petitioners' operations affect interstate commerce in the constitutional sense is based upon the statement (a) that many important interstate industries would be adversely affected if the employees of such industries could not use petitioners' trolley cars and buses for transportation to and from work; and (b) that petitioners annually "draw or cause to be drawn" into the State of Maryland large quantities of materials and supplies.

As to (a) the transportation of workers, the Board makes no denial or explanation of the fact that the choice of means of transportation, where transportation is necessary, is made by the individual worker and not by the employer; that there is no relationship, contractual or otherwise, between petitioners and industries engaged in interstate commerce, imposing any obligation on petitioners to transport

workers for any particular plant to any place at any time. Petitioners' transportation services are available to the general public, and it does not know the business or destination of its passengers. The effort here is to make federal regulation depend, not upon petitioners' business but upon the business engaged in by their patrons. There is no precedent for the Board's action. It is a clear violation of the interpretation of the National Labor Relations Act, and of the Commerce Clause of the Constitution, expressed by this Court in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, and other cases cited on petitioners' brief. Petitioners' operations do not affect interstate commerce in any "close and intimate" fashion; they do not, in a constitutional sense, affect interstate commerce in any manner. The only case not heretofore mentioned cited by the Board on this point is *N. L. R. B. v. Carroll*, 120 F. (2d) 457 (C. C. A. 1), which decided that an employer engaged under government contract in the interstate transportation of mail is an independent contractor; that the truck drivers engaged by him are his employees and not employees of the United States, and that he is subject to the provisions of the National Labor Relations Act. Nothing in that case seems to throw any light on the question under discussion.

As to (b) the statement (Board's Brief, p. 16) that petitioners annually "draw or cause to be drawn" into the State of Maryland large quantities of materials and supplies, the Board fails to comment on the fact that nothing brought into the State, such as equipment and supplies, is resold or processed for resale; that interstate commerce with respect to such purchases (which are not made regularly) ends when delivery is made to petitioners; that, therefore, interstate commerce as to any materials and supplies purchased by petitioners from time to time outside the State

is completed before such materials and supplies are used in petitioners' business; that there is no showing in the record that industrial strife on petitioners' property could possibly affect the purchase or delivery of materials and supplies used by petitioners, or in any manner affect commerce in such articles; and that petitioners do not cause any inward or outward flow of commerce preceding manufacture or sale. The Board says that "these movements" include gasoline and oil, and substantial quantities of electrical energy, although it is undisputed on the record that all of the gasoline and oil and electrical energy used by petitioners is purchased from dealers within the State. And there is no proof that any electrical energy used by petitioners came at any time from outside the State. Under the Board's theory, the purchaser in retail stores of a pound of nails, a necktie, a dress, a suit of clothes, or bar of soap would be engaged in a transaction affecting interstate commerce because the purchaser had caused those articles "to be drawn" into the State; or, as the Board argued in the lower court, had purchased materials "originating" outside the State.

There is no sound basis for these contentions, and no authority, save the lower court's, to support them. The Board does not answer the assertion that its attempt to extend the area of its jurisdiction reverses prior administrative, judicial and legislative construction of the limitations on the application of the Act, and involves the nullification of state labor relations acts. The Board's argument in support of its claimed jurisdiction confirms petitioners' statements in their petition and brief that the Board relies on principles hitherto unknown to the law, and emphasizes the necessity for issuance of the writ of certiorari, so that the questions involved may be finally determined.

2. The Board argues (Board's Brief, pp. 19-21) that its prior ruling that it lacked jurisdiction and that the Act did not apply to petitioners was not an adjudication of the jurisdictional question "but merely an administrative determination not to take action". The lower court erroneously adopted this answer to the defense of res judicata and equitable estoppel. *N. L. R. B. v. Baltimore Transit Co.*, 140 F. (2d) 51, 54 (No. 1, March 13, 1944). The Board says it "administratively" affirmed its Regional Director's finding of lack of jurisdiction. It points out, as did the lower court, that the charges involved in the instant case were filed by a different labor organization, and that the unfair labor practices were also different. But these contentions have no weight. The jurisdictional facts are the same now as they were when the prior ruling was made. The ruling was binding on the Board and on petitioners, who are the only parties under the Act. It was likewise binding generally, as all jurisdictional determinations are. The lower court fell into the error of assuming that different charges or different complainants could have any bearing on the question of the application of the Act or the extent of the jurisdiction vested by Congress in the Board. The attempt to make the Board's ruling an administrative determination, not binding on the Board or anyone else, and not subject to review, does not bear analysis. A charge was filed against petitioners in the manner contemplated by the Act and by the Board's rules and regulations. It was considered by the Board's Regional Director, as provided by the Act and the rules and regulations. The charge was dismissed by the Regional Director after thorough investigation, for lack of jurisdiction. On appeal to the Board, the Regional Director was affirmed. This was a final order. The party aggrieved had a right to seek a review, as provided by Section 10(f) of the Act, but no

petition for review was filed. The lower court says "there was no adjudication by the Board of the question of jurisdiction or any other issue," but this finding is clearly erroneous. There is no way, other than that followed, for the Board to adjudicate the question of jurisdiction. None of the cases cited on the Board's brief, note 20, p. 21, supports the Board's argument that its ruling on jurisdiction was of such an administrative nature as to have no binding effect, and as to be outside of the provisions for review. *American Federation of Labor v. N. L. R. B.*, 308 U. S. 401, cited by the Board, decided that the certification by the Board in representation proceedings under Section 9(c) of the Act was not such an action as was reviewable under Section 10(f). The Court pointed out, however, that the right of review was given any person aggrieved by a final order granting or denying the relief sought against unfair labor practices. *Federal Power Comm. v. Metropolitan Edison Co.*, 304 U. S. 375, also cited by the Board, merely decides that such administrative orders by the Federal Power Commission as those fixing a hearing and requiring respondent to appear and produce certain information; and granting a rehearing of the first order, are not reviewable under the Federal Power Act. Other cases on this point cited by the Board, to the extent that any of them are relevant, hold that the Board, where exercising discretion, cannot be compelled to issue a complaint. In the case at bar, however, the question involves the Board's refusal to issue a complaint, not in the exercise of its discretion, but because of what it now says was a mistake of law. There is no authority for the Board's contention that its order dismissing a charge, if based on a mistake of law, is not reviewable on the petition of the aggrieved person. The case of *Jacobsen v. N. L. R. B.*, 120 F. (2d) 96, seems to be authority against the Board's view.

The most important feature of the situation, which the Board does not mention in connection with this point, is that the Board, in disregarding the principles of res judicata and equitable estoppel, is here attempting to find that petitioners violated the Act, and to impose remedies for such alleged violations, during the period when, under the Board's ruling, the Act did not apply to petitioners. The Board cites no authority for its action in applying remedies retroactively. There is no such authority.

3. The Board (Board's Brief, p. 21) attempts to justify its order for checked off dues and back pay reimbursement after June 2, 1942, the date when the complaint was issued, instead of from February 1, 1943, the date when the prior ruling was reversed, by contending that the issuance of its complaint was notice to petitioners that the Board had changed its position as to the applicability of the Act. In other words, the Board argues that the issuance of its complaint was a new adjudication of the question of jurisdiction, and a reversal of its prior ruling. This contention is discussed in petitioners' brief, p. 30. The Board omits discussion of its action in ordering reinstatement of employees discharged during the period when, under the Board's ruling, the Act did not apply. The Board, under the circumstances of this case, has no authority to order reinstatement or back pay reimbursement.

4. The Board submits its own version of alleged unfair labor practices by petitioners as support for its statement that the Board's findings presents no question of general importance (Board's Brief, p. 22). This question is, of course, highly important to petitioners, and to all who may be charged with violations and subjected to the Board's processes, investigations and findings.

5. The Board argues (Board's Brief, p. 22) that the order requiring reimbursement of checked-off dues presents no question of general importance. But the Board's action does present a question of tremendous importance, involving, as it does, an effort by the Board to stretch the decision in *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, to cover all cases of checked-off dues. The statement made by the Board that the test of voluntary union membership applied in the Virginia Electric case is "fully met here" is unwarranted. The Board does not mention the fact that a number of members of the Independent preferred to pay their dues directly and declined to authorize check-off; that neither membership nor check-off was compulsory; that hundreds of employees became members of both unions, many retaining membership in the Independent because its revenues were used largely for sick and death benefits; and that some five hundred employees, some or all of whom became members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees (AFL) eventually resigned from the Independent Union (R. III, 490), and thereafter paid no dues to the Independent, either by check-off or otherwise. It should be noted that, under the Board's order, the employees who declined to authorize any check-off of union dues do not obtain reimbursement, but those who voluntarily authorized the check-off are entitled to a refund of dues. The Board's witnesses testified at length as to the fairness and advantages of the beneficial features of the Independent, and there were no requests for refund of dues. Above all, however, is the fact that the circumstances are not similar to those considered by this Court in the *Virginia Electric* case, and the Board's statement to the contrary is not supported by the record.

6. The Board argues (Board's Brief, p. 23) that it has power to require petitioners to post notices that their employees are free to join certain designated labor organizations, despite thirteen Circuit Court of Appeals decisions to the contrary cited by petitioners (Pet. 12, note 3). The Board cites a number of cases in which the Board's order contained similar provisions, but it does not appear from the opinions that the question of validity was raised or, if it was raised, that the courts ruled on it. The fact remains that, in every case in which the question has been considered and determined in the Circuit Courts of Appeals, the action of the Board has been found to be invalid. And it is apparent that, despite these decisions, the Board continues to pass invalid orders. The Board says this matter is of minor importance, but this Court has not hesitated to order corrections of even less significance. *J. I. Case Co. v. N. L. R. B.*, No. 67, October Term, 1943, decided February 28, 1944. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348, cited by the Board, is not authority supporting the Board's order in this case. This Court merely held that the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. This does not mean that the Board can grant relief beyond its powers.

7. The Board argues (Board's Brief, p. 25) that petitioners were given a fair hearing by the trial examiner, but petitioners believe that their contention that they were denied due process is amply supported by the record.

8. The Board contends (Board's Brief, p. 26) that the National Labor Relations Board Appropriation Act, 1944, does not apply. It says (a) that the statute affects only cases where an agreement "has been in existence for three months or longer without complaint being filed". It then

says that the word complaint, which refers in the National Labor Relations Act to an action instituted by the Board, means a charge filed with the Board by any person or organization. This interpretation nullifies the purpose for which the act was passed, and that purpose was to prevent the Board from instituting complaint cases or proceeding with those already instituted. Senator McCarran (Nev.) author of the motion that the Senate concur in the House amendment containing the restriction, was the only Senator who undertook, on the floor of the Senate, to define "complaint case". Senator McCarran (July 2, 1943, Cong. Rec. p. 7108) said: "What is a complaint case? It has been developed before the Senate Appropriations Committee that a complaint case is a case filed by the National Labor Relations Board."

Having interpreted "complaint" issued by the Board to mean "charge" filed with the Board by any person, the Board then says that the charge instituting these proceedings was filed within three months. This is simply not so. The contracts involved were executed on January 1 and January 18, 1942. The complaint was filed on June 2, 1942, long after the three months had expired. Even if "complaint" means "charge", it came too late, because the complaint of June 2, 1942 was based on a charge made June 1, 1942, and petitioners were formally notified to that effect (R. II, p. 795). There were earlier charges filed on March 5, 1942 and March 9, 1942 (R. II, pp. 1178, 1180), but these charges were abandoned in favor of the charge made June 1, 1942. No complaint was issued on the earlier charges, and they cannot, at this late date, be used as an instrument to continue the Board's authority which has been removed by Congress. The Board also says that the Appropriations Act does not apply to complaint cases in which

the Board had issued a decision and order prior to July 1, 1942, but the statute contains no such exemption.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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